No. 9857.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

GEORGE J. SOMERVILLE, also known as SLIM SOMERVILLE,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

PETITIONER'S OPENING BRIEF.

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FILED

AUG 2 ? 1941

Parker & Baird Company, Law Printers, Los Angeles.

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Jurisdictional Statement.

This is an appeal from an order of the United States Board of Tax Appeals, affirming the action of the Commissioner of Internal Revenue in determining deficiencies of income tax due from petitioner for the calendar years 1936 and 1937 in the respective amounts of $3,588.01 and $11,229.22. [R. 24.]

On March 15, 1939, in accordance with the provisions of Section 272A of the Internal Revenue Code, the Commissioner of Internal Revenue, respondent herein, notified petitioner that the determination of petitioner's income tax liability for the years 1936 and 1937 disclosed a deficiency of $14,817.23 [R. 6], of which amount $3,588.01 was deficiency for the year 1936 [R. 9] and $11,229.22

was deficiency for the year 1937 [R. 11]. From these determinations petitioner duly filed his appeal to the United States Board of Tax Appeals in accordance with the provisions of Section 272A of the Internal Revenue Code, and said appeal was given docket number 98831.

The appeal was called for hearing by the United States Board of Tax Appeals on June 10, 1940, at Los Angeles, California [R. 2]. Stipulation of facts was filed at said hearing [R. 34] and said stipulation contained all of the evidence to be presented and the appeal was submitted to the Board of Tax Appeals for decision [R. 2].

On March 14, 1941, the Board of Tax Appeals promulgated its findings of fact and opinion in said appeal [R. 12-23] and entered its decision and final order determining deficiencies in petitioner's income tax for the year 1936 in the amount of $3,588.01 and for the year 1937 in the amount of $11,229.22 [R. 24].

Petitioner, being an individual, residing in California, and the income tax returns of petitioner having been filed with the Collector of Internal Revenue for the Sixth District of California, at Los Angeles, California, the appeal from the decision and order of the Board of Tax Appeals was brought to this Court. The petition for review was filed on June 3, 1941 [R. 25], pursuant to the provisions of Section 1141 of the Internal Revenue Code.

Statement of Facts.

The facts were stipulated to by the parties and are incorporated in the statement of evidence approved by the Board as a part of the record of this appeal [R. 31 *et seq.*] and may be summarized as follows: Petitioner resides in the County of Los Angeles, State of California, and he and his then wife, Gertrude Martha Somerville (hereinafter referred to as "Mrs. Somerville") were residents of the County of Los Angeles, State of California, during the years 1936 and 1937 [R. 35 and 15]; petitioner and Mrs. Somerville were husband and wife for several years prior to 1936 [R. 34] and on September 1, 1936, they entered into a property settlement agreement [R. 34]; the property settlement agreement is set forth in full in the record [R. 41 *et seq.*]; on September 28, 1936, Mrs. Somerville obtained an interlocutory judgment of divorce in the Superior Court of the State of California, in and for the County of Los Angeles [R. 37], and on October 2, 1937, a final judgment of divorce was entered in said divorce proceedings [R. 39]. Petitioner's total net earnings from his personal services for the year 1936 were $61,440.46, one-half of which was reported on the income tax return of petitioner and one-half of which was reported on the income tax return of Mrs. Somerville [R. 35]; that from the date of the property settlement agreement, namely, September 1, 1936, to and including December 31, 1936, petitioner's net earnings from his personal services were $28,357.23 [R. 35]; that petitioner's net earnings from his personal services for that part of the year 1937 commencing January 1, and ending October 2 (the latter date being the date of the final judgment of divorce) were $57,883.70, one-half of which was reported on the income tax return filed by petitioner and one-half

of which was reported on the income tax return filed by Mrs. Somerville [R. 36]; and petitioner's total net earnings from his personal services for the year 1937 were $79,766.71 [R. 35].

The deficiencies here in controversy result from respondent's determination that the income of petitioner from September 1, 1936, the date of said property settlement agreement, to October 2, 1937, the date of the final judgment of divorce, was the sole and separate income of petitioner, and that petitioner and Mrs. Somerville were not entitled to file separate income tax returns, each claiming one-half of said income as their respective community shares.

Specifications of Error.

1. The Board of Tax Appeals erred in holding that the income of petitioner from his personal services for that part of the year 1936 commencing September 1 and ending December 31, and his income from his personal services for that part of the year 1937 commencing January 1 and ending October 1 was taxable entirely to petitioner as his sole and separate property.

2. The Board of Tax Appeals erred in holding that the property settlement agreement entered into by petitioner and his then wife, Gertrude Martha Somerville, had the effect of changing the status of his subsequent earnings from community earnings to separate earnings.

Summary of Argument.

The personal earnings of a husband and wife, residents of California, constitute community property under the laws of that state in the absence of an agreement between them to the contrary. Such earnings received subsequent to July 29, 1927, the effective date of Section 161a of the Civil Code of the State of California, are taxable one-half to each spouse for federal income tax purposes.

It is conceded that under California law a husband and wife can alter their respective property rights by contract, thus changing separate property into community property or community property into separate property. In this case the taxpayer and his wife entered into a contract respecting their property, but did not expressly or by implication change the character of petitioner's future earnings. In fact the contract specifically provides that for a period of two years the wife should receive one-half of the net earnings of petitioner.

This Court has held that the wife has an immediate vested interest in one-half of the earnings of the husband and, in the absence of any conveyance or agreement by her, transferring that right to the husband, it would be retained by her and be subject to the tax as her income.

Income is taxed to its owner and the ownership of income in this case depends upon the laws of California and the agreement of the parties made pursuant to those laws. Such agreements must be construed in accordance with the decisions of the appellate courts of California. Before it will be determined that a husband or wife has waived the right to his or her community interest there must be clear and explicit language to that effect and any uncertainty in the language of the agreement will be resolved in favor of the right.

ARGUMENT.

The Agreement Between Petitioner and His Wife Did Not Convert His Personal Earnings Into His Separate Property and, Therefore, Only One-half of His Earnings Are Taxable to Him.

We have heretofore referred to the record establishing that the parties stipulated that petitioner and his wife entered into a property settlement agreement on September 1, 1936, that petitioner's wife obtained an interlocutory judgment of divorce on September 28, 1936, and a final judgment of divorce was entered on October 2, 1937. Therefore petitioner and Gertrude Martha Somerville retained the status of husband and wife until the final judgment of divorce was entered. *Estate of Boeson,* 201 Cal. 36, 255 Pac. 800. In the absence of an agreement to the contrary, the earnings of a husband and wife are community property until the final judgment of divorce is entered. To that effect Section 161A of the Civil Code of the State of California provides:

> "161a. Interests in community property. The respective interests of the husband and wife in community property during continuance of the marriage relation are present, existing and equal interests under the management and control of the husband as is provided in Sections 172 and 172a of the Civil Code. This section shall be construed as defining the respective interests and rights of husband and wife in community property."

The interlocutory judgment of divorce does not dissolve the marriage.

> *Strupelle v. Strupelle,* 59 Cal. App. 526, 211 Pac. 248;
>
> *Estate of Fulton,* 50 Cal. App. (2d) 202, 59 Pac. (2d) 508.

The determination of this appeal, therefore, resolves itself into one question, namely: Does the property settlement agreement provide that the subsequent earnings of petitioner shall be his sole and separate property? To answer this question we must look to the agreement for the facts and to the California cases for the law interpreting similar agreements made by residents of that state.

In holding that the property settlement agreement changed the nature of petitioner's earnings from community to separate property, the Board of Tax Appeals failed to follow the decisions of the appellate courts of the State of California in so far as those decisions deal with the construction of such agreements. Furthermore, the Board appears to have assumed that *Van Every v. Commissioner,* 108 Fed. (2d) 650, is controlling. The record on appeal in the *Van Every* case establishes that the property settlement agreement involved in that case definitely did change the nature of all property and earnings acquired by either spouse subsequent to its date. The pertinent provisions of that agreement are quoted from pages 56 and 57 of the record on appeal in that case, filed with this Court, and provide as follows:

> "Article XVII. First party hereby releases, remises, grants and forever quitclaims to second party any and all right, title or interest which he may have or claim to have to any real or personal property possessed by second party, or standing in second party's name, and to any and all property received or

to be received by her under the terms of this agreement, and likewise to any and all estate and property which second party may acquire hereafter, in any manner whatsoever, to the end that all property heretofore or hereunder vested in second party, as well as all property acquired by her in the future, shall be her sole and separate estate, free and clear of any community property or other interest or claim therein, upon the part of first party. First party further releases and discharges second party from any and all claims, demands or obligations to support or maintain him to any extent whatever.

Article XVIII. Second party hereby releases, remises, grants and forever quitclaims to first party all of her right, title, interest and estate, including any community property interest or community property claim, in and to any and all property, whether real or personal, excepting only the real and personal property hereinabove provided to be transferred and conveyed to second party, now belonging to or possessed by or standing in the name of first party, or which first party may hereafter acquire in any manner whatsoever, to the end that all of the property now standing in the name of or belonging to first party, excepting only the property hereinabove provided to be transferred and conveyed to second party, and all property hereafter acquired by him, both real and personal, shall be his sole and separate property and estate, free and clear of any and all community property interest and/or claim upon the part of second party. Second party hereby forever releases and discharges first party from any claim, demand or obligation to support, maintain or provide for her or said minor children in any manner whatsoever, excepting for the payments to be made to her as provided in this agreement."

Furthermore, in the *Van Every* case it was conceded by the taxpayer that an agreement did change the status of their property and future earnings and that such agreements are valid in the State of California. The sole question raised in that case was whether or not such agreements, although valid for all other purposes, affected the tax liability of the husband and wife.

In this case it is petitioner's sole contention that the property settlement agreement did not provide for and therefore did not affect a change in the status of his earnings. Looking to the terms of the agreement, we find that it provides that Mrs. Somerville was to receive one-half of petitioner's net income for two years after its date, which more than covered the period of their marriage. In this connection the agreement states:

> "Now, therefore, for and in consideration of the premises and mutual covenants herein expressed by and between the said parties hereto, the party of the second part agrees to pay to the party of the first part, and the party of the first part agrees to accept, a sum equal to one-half of the net income received by the second party from whatsoever source other than from income received from investments made during said period and other than income received by reason of testate or intestate succession, for a period of two years next and consecutively following upon and from the date of the execution and signing of this property settlement agreement, . . ." [R. 44.]

Comparing the foregoing language with the following language of this Court's opinion in the case of *Sherman v. Commissioner,* 76 Fed. (2d) 810-811:

> "Bearing in mind that the wife has an immediate vested interest in one-half of the earnings of the husband, *in the absence of any conveyance or agreement by her transferring her right to the husband, it would be retained by her and be subject to tax as her income."* (Italics supplied by petitioner.)

it appears that it would be dealing in riddles to say that Mrs. Somerville received one-half of the income and at the same time the same income was *transferred* to her husband. Since she did not alienate or transfer her community one-half interest, it is inescapable, under the holding of *Sherman v. Commissioner, supra,* that she is subject to the income tax imposed upon that income.

Neither should a decision in this case be based upon *Helvering v. Hickman,* 70 Fed. (2d) 985, nor *Sparks v. Commissioner,* 112 Fed. (2d) 774, both of which cases are cited as authority in the Board's opinion. In neither of those cases was there a question as to the construction of the contract, the only question being whether or not agreements similar to the one here involved affected the tax liability of the parties, even though they were effective for all other purposes.

The Contract Involved Was Made by Residents of California Pursuant to Sections 158 and 159 of the California Civil Code and Its Interpretation Is Governed by the Decisions of That State.

The Board set forth in its opinion the following provisions of the property settlement agreement as being those material to a decision of the question involved:

> "Whereas unhappy differences have arisen between said parties by reason whereof the parties hereto from henceforth cannot live happily together, and by reason whereof they are now living separate and apart, and whereas on account of such unhappy differences the parties henceforth must live separate and apart, each from the other, and whereas in view of such facts it is the desire and intent, finally and absolutely of said parties, by this indenture, to settle and forever adjust, and have settled and forever adjusted between themselves, all of their mutual and respective present and future property rights, both as to the properties which either may claim to be community property, and also as to the separate estate of each, . . .
>
> Whereas it is further desired and agreed on the part of the parties hereto, finally and absolutely, to settle and adjust by this indenture all of their mutual and respective rights and obligations one to the other arising out of their marriage relation, and also to determine and settle their respective rights of inheritance one from the other; and
>
> Whereas the said parties hereto have, since the date of their marriage, acquired certain community property; and
>
> Whereas there is a minor child of the parties hereto, and it is their further desire and intent by this inden-

ture to provide for the maintenance, care and custody of said minor child; and

. . . .

Now therefore, for and in consideration of the premises and mutual covenants herein expressed by and between the said parties hereto, the party of the second part agrees to pay to the party of the first part, and the party of the first part agrees to accept, a sum equal to one-half of the net income received by the second party from whatsoever source other than from income received from investments made during said period and other than income received by reason of testate or intestate succession, for a period of two years next and consecutively following upon and from the date of the execution and signing of this property settlement agreement, . . .

. . . .

It is expressly understood and agreed that the above defined and described one-half of the net income of the second party agreed herein to be payable to the first party by the second party for said two year period, and the other covenants, promises, conveyances and transfers provided for in this agreement, are hereby expressly agreed to be in full and final settlement of any claim or claims of any kind or nature, other than otherwise disposed of in this property settlement agreement, which either party might or could otherwise make against the other party, or the separate estate of the other party, one against the other, whether in law or in equity or in probate; also as and for full satisfaction and settlement or any and all claim or claims of community which either might or could make against the other, . . .

XVII. It is further mutually understood and agreed that each of the parties may for themselves, independently of the other, control or do business in all matters the same as though he or she were single.

XVIII. It is further understood and agreed that in making this final settlement of property rights that each of the parties hereto waives, *relinquishes and forever surrenders all claim or claims of every kind or nature which she or he has or might hereafter acquire in or against the property of the other now held or hereafter acquired,* including the rights of inheritance in case of death intestate or testate, which right each hereby expressly waives in favor of the heirs of the other." (Italics supplied by Board.) [R. 16, 17, 18 and 19.]

We also believe that the foregoing excerpts from said agreement are all that are material for a determination of this case.

It will be noted that there is no provision in the agreement to the effect that the subsequent earnings of each spouse are to be the sole and separate property of the earner. However, the Board was of the opinion that the provisions of the agreement hereinabove quoted, and in particular paragraph XVIII, were sufficient to accomplish a change in the nature of petitioner's earnings. It is apparent that the parties did not intend that the provisions of said paragraph should refer to the one-half which was to be received by Mrs. Somerville. If Mrs. Somerville "relinquished and forever surrendered all claim or claims of every kind or nature which she had or might thereafter acquire in or to or against the property of petitioner then held or thereafter acquired by him" [par. XVII, R. 68]

it follows that she would not have been entitled to receive one-half of his earnings theretofore provided to be received by her. To place a different interpretation upon the agreement would be to argue that the agreement is inconsistent in that she received one-half of petitioner's earnings in one paragraph and it is taken away from her in another.

When the general provisions of a contract are inconsistent with the particular provisions thereof, the latter are controlling. Section 3534 of the Civil Code of the State of California provides that "particular expressions qualify those which are general," and the District Court of Appeal, in *Conover v. Smith,* 83 Cal. App. 227-234 (decided May 20, 1927, hearing in Supreme Court denied July 18, 1927) in quoting from *Scudder v. Perce,* 159 Cal. 429, 114 Pac. 571, held:

> "When general and specific provisions of a contract deal with the same subject matter, the specific provisions, if inconsistent with the general provision, are of controlling force."

Also the Board, in referring to the property settlement agreement, makes the following statement:

> "Its initial inducement clause, *supra,* declares the intent of the parties to be to 'forever settle, and have forever settled and adjusted between themselves all of their mutual and respective *present and future property rights, both as to the properties which either may claim to be community property,* and also as to the separate estate of each.' " (Italics supplied by Board.) [R. 22.]

The inducement clause is a general provision and is controlled by the specific terms of the agreement. In examining the inducement clause, we find that the parties state that the purpose of the agreement is to determine, among other things, their respective rights to property that may be claimed to be community property. The inducement clause did not say that the parties would not thereafter acquire community property. Said clause is followed immediately by the provision which states that Mrs. Somerville is to receive one-half of petitioner's earnings for a period of two years. There is nothing in the law saying that a husband and wife must contract to make all of their property either community or separate and surely they may provide that certain portions shall be community and other portions shall be separate. What occurred in this agreement, as appears by its terms, was that certain of the property was to be retained by each of the parties as the sole and separate property of the one receiving it, but this did not apply to petitioner's earnings.

Biggi v. Biggi, 98 Cal. 35, involved the construction of a property settlement agreement between a husband and wife. Among other things the agreement provided that the wife was to receive one-half of the proceeds from the sale of certain real property. A purchaser was found but the husband refused to execute a conveyance unless he received all of the proceeds from the sale. In the litigation which followed, the trial court determined that the wife had no interest in the property and entered judgment accordingly. On appeal the husband contended that the clause in the agreement providing that the wife "releases and acquits said party of the first part from all and every claim of every character and kind whatsoever to other property, other than said one-half interest in said life

estate, and the one-half of said net proceeds of said sale, as aforesaid," had the effect of conveying to him whatever interest his wife had in the land, and that her rights against him could be founded only on his obligation to pay her one-half of the proceeds of any sale that he might make. In reversing the judgment the Court held:

> "The contention by the respondent that by the aforesaid agreement between the parties, the plaintiff conveyed to the defendant whatever interest she had in the land in question, and that her rights against him are only an obligation on his part to pay her one-half of the proceeds of any sale that he may make, is contrary to a proper construction of the instrument. The provision therein that until the property should be sold the husband should be entitled to its possession and occupancy, and should pay to the plaintiff six dollars per month therefor, and the further provision that 'the parties hereto agree to abide by the judgment of said Vandercook, and to sell said premises for such sum, offered or not, as said Vandercook may determine,' are inconsistent with the proposition that the plaintiff's title to the land passed to the defendant by the instrument, and show that whenever a sale should be made in accordance with its terms, it was to be made by both parties, and that the consent of the plaintiff, as well as of the defendant, was necessary to effect the sale. The clause relied upon by the respondent wherein the plaintiff 'releases and acquits said party of the first part from all and every claim of every character and kind whatsoever to other property, other than said one-half interest in said life estate, and the one-half of said net proceeds of said sale, as aforesaid,' when read in connection with the other portions of the instrument, *and the purposes for which the*

parties recite that they have executed the agreement, must be construed as relating to 'other' property than that enumerated in the instrument, and not as a release of her interest in the property out of whose sale she was to receive one-half of the proceeds." (Italics supplied by petitioner.)

It likewise follows that the provisions of paragraph XVIII of the property settlement agreement hereinabove quoted relate to property *other* than the one-half of petitioner's future earnings that respondent was to receive, and she retained her community interest in his earnings.

We reiterate that the record shows that there was no transfer by Mrs. Somerville of her community interest in petitioner's earnings, and the courts of California have always held that before it will be determined that a property settlement agreement between a husband and wife provides for the waiver of a property right, there must be language of present transfer applying directly to the future as well as existing property. One of the latest cases on this point is *Estate of Hurley,* 28 Cal. App. (2d) 584, 83 Pac. (2d) 61. The facts of that case establish that decedent and her husband entered into a property settlement agreement with respect to their present and future property. The material provisions of said agreement are set forth in the opinion of the Court, and read as follows:

" 'That the first party has real and personal property of her own, standing in her name in Oregon and California, and it is the sense of this agreement that she is to have and retain everything that she

owns in the way of property of all kinds, both real and personal, and the second party agrees, at the time of the signing of this contract, to make and execute a Deed, wherein and whereby he shall convey to the first party whatever interest he may have by way of community interest, or otherwise, in and to: . . .' (Describing certain real property.) 'and shall make any and all other necessary conveyances, documents or instruments whatsoever to carry into effect this agreement.

" '*The second party shall not claim, on and after this date, any interest whatever in any real or personal property, including the California property, belonging to or standing in the name of first party,* and the first party shall not claim any interest whatsoever in any real or personal property belonging to and standing in the name of the second party, *and each shall take their respective properties, free and clear of all claim of the other, no matter from what source said claim or claims may arise, and this shall include all property in all States or places.*

" 'This document shall also settle all questions of alimony and any and all money demands that one could make against the other of any kind whatsoever, and the first party waives as against the second party, any and all claims that she has or might have against the second party for failure of the second party to support the first party, and this document shall be and is a complete, final and conclusive property settlement, *and settles every possible demand that one could make against the other. . . .*' " (Italics supplied by petitioner.)

The trial court determined that the foregoing language of the agreement was a sufficient waiver and release on the part of the husband to bar him from inheriting the property of his wife as an heir-at-law and he, therefore, had no right to contest her will. In construing the foregoing language of the agreement and reversing the decision of the lower Court, the Court said:

> "Appellant's first ground of appeal is that the terms of the property settlement admittedly signed by him and his wife were not such as to waive his right to inherit the property of his deceased wife as her heir at law or to bar his opposing the probate of her will. Thus the question is squarely presented whether in the case at bar the terms of the contract constituted a release of all future property rights, including inheritable interests, or whether said contract should be construed as reaching no further than to release all of the respective interests of the parties thereto in the property of the other as living spouses.
>
> "It is not disputed that husband and wife may by appropriate agreement waive their respective inheritable rights in the estate of the other. It is equally well established, however, that the courts will not construe a property settlement between husband and wife as depriving the survivor of inheritance *or other rights growing out of the marital relation, except where there is a clear and unmistakable intention to barter away such rights.* The agreement before us seems to be, as stated therein, 'a property settlement between the parties, settling everything including community property'. It also contains a mutual release of 'alimony and any and all money demands that one could make against the other of any kind whatsoever'. There is no release in terms by either one of claims upon the future acquisitions of the

other, nor, in terms any release by either one upon the estate of the other in case of death." (Italics supplied by petitioner.)

Estate of Andres, 126 Cal. App. 146, 14 Pac. (2d) 566 (decided September 21, 1932, hearing in Supreme Court denied November 17, 1932), involved the interpretation of a property settlement agreement between a husband and wife. The parties had not been divorced and the wife claimed the right to a family allowance from her deceased husband's estate. The executor contested this claim and in defense set up a property settlement agreement which had been entered into by the wife and decedent. The following excerpt from the opinion sets forth the material provisions of the agreement:

> "The agreement referred entirely to property and recited that they desired to separate their property interests, 'in order that each party may have exclusive control and disposition of all property standing in his or her respective name.' Therefore in consideration of the premises and of other good and valuable consideration, and of the sum of $2,350 received by Mrs. Anders 'in full satisfaction for this agreement and *in full settlement of her community rights now or hereafter acquired by her'*, she released to her husband, his heirs and assigns forever, 'all the right, title and interest, which said party of the first part now has or may hereafter acquire, *by operation of law or otherwise, in and to all other property, real, personal and mixed, which said party of the second part now owns or has acquired or which he may hereafter acquire or own, or which may now or hereafter stand in his name, whether the same be community property or otherwise.'"* . . .

"In a very recent case the Supreme Court of California had before it an appeal from an order granting a family allowance to the widow of a decedent, where the objection to the allowance was based upon a claim of waiver by virtue of a contract between husband and wife. The court said: 'The sole question presented on the appeal is whether the petitioner waived her right to ask for a family allowance by reason of the above-quoted provision of the property settlement agreement. It is not disputed that the wife may, by her agreement, waive such rights. It is well established, however, that in order to bar a family allowance the intention to waive the right must be clear and explicit, and that any uncertainty in the language of the agreement will be resolved in favor of the right. (*In re Estate of Whitney,* 171 Cal. 750 (154 Pac. 855); *In re Estate of Gould,* 181 Cal. 11 (183 Pac. 146).)' *In re Bidigare's Estate,* 215 Cal. 28 (8 Pac. (2d) 122).)" (Italics supplied by petitioner.)

In determining that the foregoing language did not bar her from obtaining a family allowance the Court said:

"The words 'or otherwise' should not, we think, be held to extend the waiver to a claim for family allowance, but should be held to refer to the claims mentioned in the clause in which they are found, viz., claims between them as husband and wife. *These words used in the agreement, instead of being plain and explicit evidence of waiver, tend to the uncertainty which is not permitted to control in cases of this kind.'*" (Italics supplied by petitioner.)

In *Estate of Bidigare,* 215 Cal. 28, 8 Pac. (2d) 123, the wife was granted a family allowance out of her deceased husband's estate and the executor appealed from the order. It was contended by the executor that the widow had waived her right to a family allowance by the following provisions of a property settlement agreement theretofore entered into by the widow and the decedent:

> "It is hereby agreed that, except as herein specified, each party hereto is hereby released and absolved from any and all obligations and liabilities for the future acts and duties of the other, and that each of said parties hereby releases the other from any and all liabilities, debts or obligations of any kind or character incurred by the other from and after this date, and from any and all claims and demands, including all claims of either party hereto upon the other for support and maintenance as wife or husband, or otherwise, it being understood that this instrument is intended to settle the rights of the parties hereto in all of said respects."

The Court, in determining that the foregoing language was not sufficient to bar the widow from the benefits of the family allowance, held:

> "The sole question presented on the appeal is whether the petitioner waived her right to ask for a family allowance by reason of the above-quoted provision of the property settlement agreement. It is not disputed that the wife may, by her agreement, waive such right. It is well established, however, that in order to bar a family allowance the intention to waive the right must be clear and explicit, and that any un-

certainty in the language of the agreement will be resolved in favor of the right. (*Estate of Whitney,* 171 Cal. 750 (154 Pac. 855); *Estate of Gould,* 181 Cal. 11 (183 Pac. 146).)

"The agreement here in question does not in terms waive or purport to waive any claim as surviving widow, as was the case in *Estate of Yoell,* 164 Cal. 540 (129 Pac. 999). By the agreement each party is released from 'any and all claims and demands including all claims of either party hereto upon the other for support and maintenance as wife or husband, or otherwise'. No provision of the contract suggests that the parties had in contemplation the death of the husband before the entering of the final decree of divorce. The release of claims and demands of one against the other would seem to refer to claims and demands between them as living spouses. The claim of the widow here asserted is against the estate of the decedent and not against him. The words 'or otherwise' should not, we think, be held to extend the waiver to a claim for family allowance but should be held to refer to the claims mentioned in the clause in which they are found, viz., claims between them as husband and wife. These words used in the agreement, instead of being plain and explicit evidence of waiver, tend to the uncertainty which is not permitted to control in cases of this kind."

In *Estate of Shapiro,* 39 Cal. App. (2d) 144, 102 Pac. (2d) 569 (decided May 17, 1940, hearing in Supreme Court denied July 16, 1940), the District Court of Appeal affirmed a judgment of the trial court granting a family allowance to the widow of decedent. It was claimed by the objectors that the widow had waived her right to a

family allowance by entering into an agreement which contained the following provisions:

> "As an integral part hereof, and in consideration of all mutual covenants contained herein, that both parties hereby release each other, waive and relinquish all rights, interest or claims against the other for any alimony, attorney's fees or costs in connection with any possible litigation there may be between them and arising out of, or in connection with their domestic relations, or otherwise, which may happen between them at any time during their married life, including also all rights of inheriting, administration, homestead or otherwise, whatever. . . ."

In discussing the question involved and determining that the above quoted provisions of said property settlement agreement did not have the effect claimed by appellant, the Court said:

> " 'The right of a widow to a family allowance is a personal privilege and she can relinquish it when there are no children (*Estate of Yoell,* 164 Cal. 540 (129 Pac. 999); *Estate of Noah,* 5 Cof. Prob. Dec. 277, affirmed in 73 Cal. 583 (15 Pac. 287, 2 Am. St. Rep. 829) and 88 Cal. 468 (26 Pac. 361)); . . . or she may waive and release it in advance by an antenuptial agreement (*Estate of Yoell, supra*) or by a separation agreement (*Estate of Bidigare,* 215 Cal. 28 (8 Pac. (2d) 122; *Wickersham v. Comerford,* 96 Cal. 433 (31 Pac. 358)), but such a waiver must be certain and intended (*Estate of Bidigare, supra*) . . . Whether the right to demand an allowance has been surrendered is a question of interpretation of the contract or decree set up as a bar to the right. In either case the right should not be held to have been surrendered, except by clear and ex-

plicit language. (*Estate of Bidigare, supra; Estate of Gould,* 181 Cal. 11 (183 Pac. 146); *Estate of Whitney,* 171 Cal. 750 (154 Pac. 855); *Estate of Myers,* 115 Cal. App. 443 (1 Pac. (2d) 1013).)' (11A Cal. Jur. 521 *et seq.*)"

Since the decision was rendered by the Board of Tax Appeals in this case, the case of *Boland v. Commissioner,* 118 Fed. (2d) 622 (9th Circuit) was decided. It may be claimed that the *Boland* case is authority, but the facts of that case show that it is in no way determinative of the issues here involved. In the margin of the opinion portions of the agreement are set forth which establish that the Bolands expressly agreed that the husband's earnings would be his separate property. In that connection the following language is more than ample to support the Court's holding:

> " 'The parties hereto also being desirous of settling their respective rights in and to the community property of the parties hereto now existing and of . . . *fixing and determining the character of the property hereafter to be acquired by the parties hereto, and . . . and said party of the second part hereby agrees that the portion of the income of the party of the first part not hereinabove in paragraph (1) hereof assigned to the party of the second part and any proceeds from the investment or reinvestment of said portion of said income shall be and become the separate property of the party of the first part.*' " (Italics supplied by petitioner.)

Furthermore, as it was pointed out by the Court in the following language of that decision, the operative parts of the agreement are inconsistent with the concept of community property:

> *"This evidences a fixed determination to strip any future income of its community character, but the operative parts of the agreement are also inconsistent with the concept of community property. For instance, the agreement provides that petitioner assign twenty-five per cent 'of his income for personal services, * * * and such additional portion * * * as* shall be necessary to make the amount hereby assigned equal to the minimum of Five Hundred Dollars ($500.00) per month * * *.' Under the laws of California 'The respective interests of the husband and wife in community property during continuance of the marriage relation are present, existing and equal interests * * *.' Civil Code Calif. #161a. *The agreement contemplates payment of the $500 a month whether earned or not* (*cf.* Burnet v. Whitehouse, 283 U. S. 148, 151, 51 S. Ct. 374, 75 L. Ed. 916, 73 A. L. R. 1534); *the twenty-five per cent is certainly not a present, existing and equal interest."* (Italics supplied by petitioner.)

Of course, it must be conceded that Mrs. Somerville retained and did not transfer her right to receive one-half of petitioner's earnings during the continuance of the marriage, and that important fact places this case squarely within the holding of *Sherman v. Commissioner, supra,* wherein the Court, at page 811, said:

> Bearing in mind that the wife has an immediate vested interest in one-half the earnings of the husband, in the absence of any conveyance or agreement by her transferring that right to the husband, it

> would be retained by her and be subject to tax as her income."

The agreement, being subject to the construction placed on similar agreements by the decisions of the Appellate Courts of California, we believe that the cases cited herein, when applied to the facts, demonstrate that there was no intention on the part of petitioner or his wife to change the nature of petitioner's earnings from community to separate.

In concluding on this question, we can do no better than to quote from the language of the opinion in *Jones v. Lamont,* 118 Cal. 499, 50 Pac. 766, wherein the Court, at page 502, in referring to property settlement agreements between a husband and wife, said:

> "We do not think the courts should come to the aid of these contracts so as to deprive either the husband or wife of the property rights growing out of the married relation, except where there is a clear and unmistakable intention to barter away such rights."

Conclusion.

It is therefore earnestly contended that since, by the terms of the agreement, petitioner's wife did not transfer her community interest in his earnings, but continued to receive the portion thereof given to her by the community property laws of California, the decision of the Board of Tax Appeals is erroneous and should be set aside.

Respectfully submitted,

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